

WWE
MEMORANDUM

To: Wright Water Engineers, Inc. Clients and Contacts

From: Wright Water Engineers, Inc.
Noah Greenberg, PWS

Date: May 30, 2023

Re: Jurisdictional Waters of the United States Following Supreme Court Decision in *Sackett v. Environmental Protection Agency*

Wright Water Engineers, Inc. (WWE) prepared this memorandum regarding Clean Water Act (CWA) jurisdiction following the Supreme Court of the United States (SCOTUS) May 25, 2023 decision in [*Sackett v. Environmental Protection Agency*](#) (*Sackett*). The *Sackett* decision will affect jurisdictional determination (JD) policies and regulations of the administering agencies (U.S. Army Corps of Engineers [USACE] and U.S. Environmental Protection Agency [USEPA]).¹ A JD is the process used by the agencies to determine which wetland and non-wetland waters are waters of the United States (WOTUS).

CASE SUMMARY: In *Sackett*, the plaintiffs challenged the USEPA’s authority to assert CWA jurisdiction over specific wetlands in Idaho that are in the vicinity of, but not directly abutting (touching), a tributary to Priest Lake. In a 5-4 ruling, the SCOTUS ruled that the wetlands on the Sackett’s property are not WOTUS. The majority opinion, authored by Justice Alito, concludes that for wetlands to be jurisdictional WOTUS, they must share a border with, and be indistinguishable from, bodies of water that are WOTUS “in their own right.”

BIG PICTURE: The SCOTUS *Sackett* decision is expected to result in a reduction in the number of wetlands that are WOTUS. Whereas current regulations identify that wetlands that are near WOTUS are jurisdictional if they meet a ‘significant nexus’ test, the *Sackett* decision is expected to limit jurisdiction to only those wetlands that abut (i.e., share a border with) another WOTUS.

NEAR TERM PRACTICAL EFFECTS (predicted): At the time of this memorandum’s preparation, the agencies did not provide a statement on how they will respond to the *Sackett* decision. Previous experience suggests some combination of the following may occur:

1. Agencies Pause JD Processing Pending Availability of Policy to Comply with SCOTUS Decision in *Sackett*

The presently available JD methodology and manuals are not consistent with this SCOTUS decision. JDs processed under existing available methods would be at risk for legal challenge.

¹ This memorandum summarizes emerging regulatory developments and should be considered preliminary and subject to revision following forthcoming agency guidance, implementation policy, and/or rulemaking.

2. Agencies Issue Interim Guidance Regarding JD Processing and Rulemaking

The agencies may issue interim guidance on how they will proceed with necessary steps to resume processing JDs and associated project authorizations.

3. Agencies Promulgate Rule that Complies with SCOTUS Decision in *Sackett*

The agencies are expected to develop a new rule that complies with the criteria provided in the *Sackett* decision. This rulemaking process could take several years and would be expected to be heavily litigated.

4. State and Local Wetland Regulations

States and local governments may continue to develop new regulations to regulate wetlands that fall outside the scope of WOTUS following this ruling. For example, Colorado is creating a '[dredge and fill](#)' permit program that is expected to apply to certain wetland and non-wetland waters that fall outside the new scope of WOTUS.

RECOMMENDATIONS: WWE recommends that stakeholders evaluate the practical implications of this ruling. Short term effects may include delays in obtaining USACE JDs and regulatory uncertainty. Long term effects may include reduced federal permitting and mitigation requirements for projects that discharge dredge or fill material into wetlands. Be aware of emerging state and local wetland regulations that may introduce permitting complexity and associated delays.

If you have any questions about how this SCOTUS ruling may affect your projects or property, please do not hesitate to reach out to your WWE point of contact or WWE wetland scientist, Noah Greenberg at: ngreenberg@wrightwater.com or (303) 480-1700.